

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 4, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP480-CR

Cir. Ct. No. 2014CF4067

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC D. WALKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM S. POCAN, Judge. *Affirmed.*

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 PER CURIAM. Eric D. Walker appeals a judgment of conviction and a postconviction order. The only issue is whether the circuit court properly denied him sentence credit for the days he spent in custody after he signed a personal recognizance bond but before the circuit court imposed sentence upon

him. Because Walker remained in custody during the disputed periods as a consequence of juvenile court proceedings for delinquent acts distinct from his crime, we affirm.

BACKGROUND

¶2 On September 10, 2014, when Walker was sixteen years old, police arrested him following a chase. The State filed a delinquency petition the next day in connection with the arrest. The petition alleged that on September 10, 2014, Walker operated a motor vehicle without the owner's consent, recklessly endangered safety in the second degree when he narrowly avoided a pedestrian while driving fifty miles per hour in a parking lot, and obstructed an officer by running away on foot when police tried to apprehend him.¹ A few days later, the State filed the criminal complaint underlying this appeal, alleging that on September 10, 2014, Walker attempted to flee or elude a traffic officer by increasing the speed of his vehicle after receiving a signal from the officer. *See* WIS. STAT. § 346.04(3) (2013-14).²

¶3 On September 19, 2014, Walker made his initial appearance in the criminal case. The circuit court allowed his release on a personal recognizance bond, which he signed. Walker remained in secure detention, however, pursuant

¹ The State filed a second delinquency petition in September 2014, alleging that, on August 5, 2014, Walker operated a motor vehicle without the owner's consent, stole items from two people, and obstructed an officer. Walker and the State agree that the petition regarding the incidents of August 5, 2014, is not relevant to resolving the legal questions presented in this appeal. We do not further discuss the second petition.

² A court of criminal jurisdiction is the exclusive forum for proceedings against persons sixteen years of age or older alleged to have violated WIS. STAT. § 346.04(3) (2013-14). *See* WIS. STAT. §§ 938.17(1) (2013-14), 346.17(3) (2013-14). All subsequent citations to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

to the pending delinquency proceedings. On October 29, 2014, he was adjudicated delinquent and placed in a secure juvenile facility until May 18, 2016, his eighteenth birthday.

¶4 Walker scheduled a plea and sentencing hearing in the criminal case for December 18, 2014, but the matter was twice adjourned, first because his lawyer was ill and then because the State failed to produce Walker for the hearing. He pled guilty as charged on February 25, 2015, but the State was not prepared for sentencing on that date, so the circuit court adjourned the case a third time. On April 28, 2015, the matter proceeded to sentencing, and the circuit court imposed forty-two months of imprisonment. The circuit court ordered Walker to serve his sentence concurrently with his juvenile commitment and granted him sentence credit for days he spent in custody from September 10, 2014 to September 19, 2014.

¶5 Walker filed a postconviction motion seeking an additional 222 days of credit for the period from September 19, 2014 to April 28, 2015. The circuit court denied the motion. He appeals, challenging only a portion of the circuit court's decision. He now seeks 173 days of presentence credit, specifically: (1) forty-one days for the period from September 19, 2014, until disposition of the delinquency allegations on October 29, 2014; and (2) 132 days for the period from the adjourned plea and sentencing date of December 18, 2014, until the actual sentencing on April 28, 2015.

DISCUSSION

¶6 WISCONSIN STAT. § 973.155 governs sentence credit. *State ex rel. Thorson v. Schwarz*, 2004 WI 96, ¶14, 274 Wis. 2d 1, 681 N.W.2d 914. The

statute provides, in pertinent part, that a convicted defendant is entitled to credit against his or her sentence:

for all days spent in custody in connection with the course of conduct for which sentence was imposed.... ‘[D]ays spent in custody’ includes ... confinement related to an offense for which the offender is ultimately sentenced, or for any other sentence arising out of the same course of conduct which occurs: 1. While the offender is awaiting trial; 2. While the offender is being tried; and 3. While the offender is awaiting imposition of sentence after trial.

See § 973.155(1)(a). The defendant has the burden to prove “both ‘custody’ and its connection with the course of conduct for which the ... sentence was imposed.” *State v. Carter*, 2010 WI 77, ¶11, 327 Wis. 2d 1, 785 N.W.2d 516.

¶7 Walker first claims he is entitled to presentence credit for the period that he was in secure juvenile detention from September 19, 2014, until disposition of the juvenile delinquency proceedings on October 29, 2014.³ Credit is required, he argues, because during that period he was awaiting resolution not only of the juvenile case but also of the criminal case, and because both the criminal and the juvenile proceedings arose “from the same incident.” We reject this argument.

¶8 To receive presentence credit, Walker must show that his presentence custody arose from the “same course of conduct” for which he was sentenced. *See* WIS. STAT. § 973.155(1)(a). The phrase “same course of conduct” is narrowly construed. *See State v. Tuescher*, 226 Wis. 2d 465, 471-72, 595 N.W.2d 443 (Ct. App. 1999). When, as here, a court considers the phrase under

³ Time spent in “secure juvenile detention would be eligible for credit consideration under [WIS. STAT. §] 973.155 [] as if it were adult jail time.” *See State v. Baker*, 179 Wis. 2d 655, 659, 508 N.W.2d 40 (Ct. App. 1993).

circumstances where a defendant has received multiple concurrent dispositions imposed at different times but arising from a single criminal episode, the phrase refers to “the specific act for which the defendant is sentenced.” *See id.* This construction effects the purpose of the statutory language, which is designed to ensure presentence credit:

even if [the defendant] is ultimately convicted of a different crime than that charged.... [I]t seems apparent that the phrase ‘arising out of the same course of conduct,’ was not intended to refer to dual credit for multiple charges, but was instead intended to assure that credit would be given in the case of conviction of a different crime than that charged.

State v. Boettcher, 144 Wis. 2d 86, 98, 423 N.W.2d 533 (1988).

¶9 Walker’s custody for the acts of delinquency he committed on September 10, 2014, was not based on the same specific acts as those underlying his criminal charge. As we have seen, the State charged Walker with a crime because he attempted to elude a traffic officer by increasing the speed of his vehicle after receiving the officer’s signal. The delinquency petition, however, was based on Walker’s driving a car without the owner’s consent, endangering the safety of a pedestrian in a parking lot, and running away on foot when an officer approached him. Although the criminal charge and the delinquency allegations arose from a single criminal episode, that fact does not constitute the same “course of conduct” within the meaning of WIS. STAT. § 973.155(1)(a). *See Tuescher*, 226 Wis. 2d at 471-72.

¶10 Walker was in presentence custody for the specific acts underlying the criminal charge only from September 10, 2014, until September 19, 2014. On September 19, 2014, he signed a personal recognizance bond permitting his release from custody in the criminal case, and, until he was sentenced in

April 2015, he was no longer in custody in connection with the specific acts supporting the criminal charge of attempting to elude a traffic officer. *See State v. Beiersdorf*, 208 Wis. 2d 492, 498-99, 561 N.W.2d 749 (Ct. App. 1997) (explaining that under WIS. STAT. § 973.155, a defendant who signed a personal recognizance bond on one charge was not in custody in connection with that charge while held on cash bond for subsequent but related charges). Accordingly, § 973.155 does not entitle Walker to presentence credit for time in custody after signing a personal recognizance bond in this case. *See Beiersdorf*, 208 Wis. 2d at 498-99; *see also Tuescher*, 226 Wis. 2d at 471-72.

¶11 Walker nonetheless argues he is entitled to presentence credit as a matter of equity for the time he spent in a secure juvenile facility from December 18, 2014, until April 28, 2015, because, during that time, he was unable to resolve the criminal case for reasons beyond his control. In support, he cites *State v. Thompson*, 225 Wis. 2d 578, 581, 593 N.W.2d 875 (Ct. App. 1999). The case does not aid him.

¶12 First, we reject Walker’s reading of *Thompson* as standing for the proposition that “equitable factors can lead to additional sentence credit where sentencing hearings are adjourned for reasons beyond the control of the defendant.” The *Thompson* court recognized the equities supporting a claim for credit under such circumstances but did not address the argument and resolved the case on other grounds. *See id.* at 581. Thus, *Thompson* did not squarely hold that a court may award sentence credit based on equitable factors divorced from the language of WIS. STAT. § 973.155.

¶13 Second, Walker’s case is not controlled by *Thompson* because the factual scenarios in the two matters are simply not the same. In *Thompson*, a

juvenile was arrested for a crime while serving a term of juvenile parole. *See id.*, 225 Wis. 2d at 580. Unlike here, the circuit court in **Thompson** imposed a cash bond in the criminal case. *See id.* Further, the pending criminal charges in **Thompson** led directly to revocation of the defendant's juvenile parole and the defendant's return to a secure juvenile facility pending criminal sentencing. *See id.* As **Thompson** made clear, revocation of juvenile parole “is not continuing punishment for the offense that led to [the] delinquency adjudication; [rather], it reflects the juvenile authorities' determination that [the] *new offense* requires continuing treatment in a secured correctional facility.” *See id.* at 584 n.2 (emphasis amended). Thus, the **Thompson** defendant was in fact in presentence custody in connection with the specific acts for which the circuit court ultimately imposed sentence. *Id.* at 586. Walker, by contrast, signed a personal recognizance bond permitting his release from custody in the criminal case, and his continued detention thereafter stemmed solely from acts of juvenile delinquency separate and distinct from the acts supporting the criminal charge.

¶14 Walker was serving a juvenile commitment from December 18, 2014, to April 28, 2015, that was not imposed for the same acts as those underlying the criminal sentence he ultimately received in this case. Under those circumstances, **Tuescher**, not **Thompson**, states the controlling rule: “a defendant earns credit toward a future sentence while serving another sentence *only* when both sentences are imposed for the same specific acts.” *See id.*, 226 Wis. 2d at

479 (emphasis added). Walker is thus not entitled to the additional presentence credit he seeks.⁴ *See id.*

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

⁴ The court observes that R.7 in the appellate record is a two-page document that does not pertain to this case but rather pertains to Milwaukee County circuit court case No. 2014CM4067. Upon remittitur, we direct the circuit court to oversee removal of the document from the record in the instant matter. *See State v. Prihoda*, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857 (clerical error may be corrected at any time).

